80-1661

No. _____

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ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

JAMES EDWARD EGAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

On Appeal From New York State Supreme Court, Appellate Division, Fourth Department

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is New York's standardless, discretionary, violent felony sentencing scheme (New York Penal Law §70.02, subdivisions (3) and (4)) violative of the Due Process Clause of the Fourteenth Amendment?

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JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Pursuant to Rules 12.2 and 15 of the Supreme Court of the United States, Appellant, James Edward Egan, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the New York Supreme Court, Appellate Division, Fourth Department in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion in which the Appellant's conviction for Murder, Second Degree, was reversed and remanded by the State of New York Supreme Court, Appellate Division, Fourth Department, may be found at 72 A.D.2d 239, 424 N.Y.S.2d 546. The Appellate Division upheld the provision in question without opinion and the New York Court of Appeals denied leave to appeal by Order dated Feb. 3rd, 1981. Neither order has yet been reported.

GROUNDS OF JURISDICTION OF SUPREME COURT

The appeal was brought in the Appellate Division, Fourth Department, on the grounds that inter alia, the statute under which the Appellant was sentenced, New York Penal Law Section 70.02 (3) (4) was unconstitutional as a violation of the Eighth and Fourteenth Amendments of the United States Constitution. The constitutionality was upheld as the judgment was unanimously affirmed without opinion by Order dated November 13, 1980. The Appellant timely filed an application for leave to the New York Court of Appeals on or about November 25, 1980. Said leave was denied hence rendering the Appellate Division, Fourth Department Order final on February 3, 1981. The jurisdiction of this Court is invoked under the provisions of Title 28 of the United States Code, Section 1257(2).

Cases that sustain the jurisdiction of this Court include: *American Railway Express Co. v. Levee*, 263 U.S. 19; *Brown v. Texas*, 443 U.S. 47 (1979) and *Cohen v. California*, 403 U.S. 15.

The relevant constitutional provision for the purpose of this appeal is the Fourteenth Amendment, which provides as follows:

Section 1. Citizens of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

> State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (United States Constitution Amendment 14 Section 1).

The relevant point of the State statute, New York Penal Law Section 70.02 is as follows:

> 3. Maximum term of sentence. The maximum term of an indeterminate sentence for a violent felony offense must be fixed by the court as follows:
>
> (a) For a Class B felony, the term must be at least six years and must not exceed twenty-five years; and
>
> * * *
>
> 4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a violent felony offense must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows: The Appellant, who had no prior criminal record, or involvement with the law, was convicted by a jury in Monroe County New York, of Murder in the Second Degree and thereafter sentenced to the minimum one can receive for murder in New York; fifteen years to life.

At no time did the People intimate that the defendant was the prime mover, rather, proof was offered which, taken in a light most favorable to the People, showed that; first, the Appellant and his wife, who were occupying a residence with the Appellant's wife's ex-husband (the victim herein) were suffering from some nondescript harrassment from a source or sources

which may have included the ex-husband-victim; second, that the Appellant purchased an unlicensed .38 caliber pistol approximately six months prior to the crime; third, that on the night in question, the Appellant handed the weapon to his wife and in reply to her inquiry "Shall I do it now?", replied "Yes, put the gun away"; fourth, the Appellant's wife thereafter entered the bedroom of the now sleeping ex-husband and fatally wounded him with the .38 caliber weapon; fifth, the Appellant is alleged to have uttered, "She blew him away; Mavis is the first number one hit woman in the world." For his part, the Appellant maintained that the weapon was removed from its place of safekeeping to show to an acquaintance, and that he had no further instruction for his wife other than to put the weapon away. The Appellant flatly denies making the foregoing statement. (A complete factual statement is contained at 72 A.D. 239, 240-242, 424 N.Y.S.2d 546).

On January 24, 1980, the Appellate Division, Fourth Department, reversed the Appellant's conviction and ordered a new trial finding that the trial justice's charge on intent denied the defendant due process of law.

On February 22, 1980, the defendant chose to enter a plea of guilty to Manslaughter, First Degree, a Class B violent felony, for which he was sentenced by the same trial justice to the maximum one can receive for manslaughter in New York; eight and one-third to twenty-five years, which sentence he is currently serving.

Pursuant to New York Criminal Procedure Law Section 450.30, *Appeal from Sentence*, Appellant timely filed a Notice of Appeal with the Appellate Division, Fourth Department and, on appeal, contended inter alia, that Section 70.02 (3) (4) of the New York Penal Law was unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and inhuman punishment and the Fourteenth Amendment's requirement of

due process of law. Affirming without opinion, the Appellate Division necessarily found the statute constitutional, a decision on which the Appellant sought, but was denied review by the New York Court of Appeals.[1]

SUBSTANTIALITY OF FEDERAL QUESTIONS

The Appellant respectfully submits that Section 70.02 (3) (4) of the New York Penal Law is violative of the Fourteenth Amendment in that although it provides two ranges in which the selected sentence may lie, nowhere are standards set forth through which the sentencing authority may be guided, and the respective interests of society and the defendant protected.

In 1977, this Court decided *Gardner v. Florida*, (430 U.S. 349). Like *Williams v. New York* (337 U.S. 241), *Gardner* dealt with the applicability of statements obtained extrajudicially at the sentencing stage of the trial. In declining to apply *Williams*, however, the Court, in an opinion by Mr. Justice Stevens, which was joined by Justices Stewart and Powell, chose to take a giant step forward. Instead of relying on the Eighth Amendment analysis to provide the procedural safeguards as it had done in previous death penalty cases, the Court chose to rely solely upon the Fourteenth Amendment in declaring: "It is now clear that the sentencing process, as well as the trial itself, must satisfy the Due Process Clause." (*Gardner v. Florida*, 430 U.S. 349, 358; See also, *Furman v. Georgia*, 408 U.S. 238; *Gregg v. Georgia*, 428

[1]Applications to the Appellate Division, Fourth Department for leave to the Court of Appeals in criminal matters are highly disfavored and discouraged. Counsel in this Department routinely make all such applications to the Court of Appeals.

U.S. 153; *Proffit v. Georgia*, 428 U.S. 242; *Jurek v. Texas*, 428 U.S. 280; *Woodson v. North Carolina*, 428 U.S. 280).

This statute, as previously noted, essentially sets forth two ranges in which the selected punishment can lie. As in effect on the date of Appellant's sentencing the trial justice was authorized to impose a maximum term between six and twenty-five years, with a minimum term to be one-third the maximum term so imposed.[2] Notwithstanding the broad scope granted by the statute, nowhere does there exist any formulation or procedural safeguards to guide the sentencing authority in the exercise of its discretion.

Nor may the impact of this Court's recent pronouncements on due process go unnoticed. In *Graham v. Richardson* (403 U.S. 365) this Court firmly rejected the notion that a constitutional right may be made to turn upon whether a particular benefit is characterized as a right or privilege (supra., at p. 374). Instead, the application as repeated in *Goldberg v. Kelly* (397 U.S. 254) depends on the extent to which an individual will be "condemned to suffer a grievous loss" (supra., at p. 263; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168). Such a grievous loss has been found to exist in the revocation of parole, (*Morrissey v. Brewer*, 408 U.S. 471) the loss of prison good time credit (*Wolff v. McDonnell*, 418 U.S. 539), the revocation of licenses (*In Re Ruffalo*, 390 U.S. 544; *Bell v. Burson*, 402 U.S. 535) and dispute settlement procedures (*Board of Regents v. Roth*, 408 U.S. 564). Crucial to each of the foregoing is the question of entitlement, for where the state has seen fit to create a liberty

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[2]Interestingly, the statute was amended, effective August 12, 1980, in a manner which adds to the discretion previously enjoyed. It now provides that in Class B violent felony offenses (of which manslaughter is included) it is permissible for the trial judge to impose a minimum term between one-third the maximum and one-half the maximum term imposed (New York Penal Law Section 70.02(4)).

interest falling within the ambit of the Fourteenth Amendment it may not revoke that interest without satisfying "those minimum procedures appropriate under the circumstances and required by the due process clause . . ." (*Wolff v. McDonnell*, 418 U.S. 539, 557).

When the New York statute is examined by the analysis hereinbefore discussed, it is found constitutionally infirm.

Although the State of New York is not required to establish a lesser term of incarceration for any specific offense, once it has legislatively determined that certain individuals, although convicted of serious offenses, require a shorter term than others, no individual should be denied access to such a term absent due process. (*Wolff v. McDonnell*, supra.). This statute, silent as to any standards to be employed in determining whether an individual shall be so sentenced, has resulted in the institution of numerous subjective standards, all differing to one degree or another in their criteria (See *State v. Huelsman*, 588 P.2d 394, 403, Hawaii, 1978).

Without supplying empirical data it may be stated with reasonable certainty that any decision on the merits in this appeal would have a potentially far reaching impact in the manner in which state court defendants would be sentenced to long prison terms. Equally certain is that guidance on this issue is long overdue (See generally Senator Edward M. Kennedy in his *Introduction to a Symposium on Sentencing*, at 7 Hofstra Law Review 1 (Fall 1978), and discussions contained therein).

CONCLUSION

For the reasons stated above, Appellant respectfully submits that this appeal brings before the Court a substantial and important constitutional question which requires plenary consideration, with briefs on the merits and oral argument, and that this issue's broad impact, as well as the Appellant's exhaustion of available state court remedies, constitutes a basis upon which this Court should note probable jurisdiction.

Respectfully submitted,

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Appendices

APPENDIX A
Judgment and Order of the
Appellate Division Fourth Department

SUPREME COURT OF THE
STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., SIMONS, SCHNEPP, DOERR, WITMER, JJ.

People of the State of New York,

Respondent,

v.

James Egan,

Appellant.

The above named James Egan, having appealed to this Court from a judgment of the Supreme Court, entered in the Monroe County Clerk's office on March 7, 1980, and said appeal having been argued by Edward Fiandach, of counsel for appellant, Sharon Stiller, of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed.

Entered: Nov 13 1980

MARY F. ZOLLER, *Clerk*

APPENDIX A
Judgment and Order of the
Appellate Division Fourth Department

Supreme Court
Appellate Division
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this Nov 13 1980*

/s/ MARY F. ZOLLER
Clerk.

(SEAL)

APPENDIX B
Order of the New York Court of Appeals Denying Leave to Appeal

State of New York
Court of Appeals

BEFORE: HON. DOMENICK L. GABRIELLI, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JAMES EGAN,

Movant-appellant

CERTIFICATE DENYING LEAVE

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Bath, New York
Feb. 3, 1981

/s/ DOMENICK L. GABRIELLI
Associate Judge

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*Description of Order: Order of the Appellate Division, Fourth Judicial Department, entered on November 13, 1980 which affirmed a judgment of the Supreme Court, Monroe County, rendered on March 7, 1980.

APPENDIX C
Notice of Appeal to the Supreme Court of the United States

STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION

COUNTY OF MONROE
FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs-Respondents,

vs.

JAMES EDWARD EGAN,
Defendant-Appellant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JAMES EDWARD EGAN, the Appellant above named, hereby appeals to the Supreme Court of the United States from the Order of the New York Supreme Court Appellate Division Fourth Department, affirming the Defendant-Appellant's sentence of eight and one-third to twenty five years which was rendered final by the refusal of the New York Court of Appeals to grant certification for further appeal on February 3rd, 1981.

THIS APPEAL IS TAKEN pursuant to Title 28, United States Code, Section 1257, Subparagraph 2.

DATED: March 18th, 1981

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(FILED MARCH 18, 1981)

APPENDIX D
Section 70.02 of the Penal Law of the State of New York

New York State Penal Law

Section 70.02

§*70.02 Sentence of imprisonment for a violent felony offense*

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, or a class D violent felony offense, defined as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, rape in the first degree as defined in section 130.35, sodomy in the first degree as defined in section 130.50, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15 and criminal possession of a dangerous weapon in the first degree as defined in section 265.04.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a); assault in the first degree as defined in section 120.10, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10 and criminal possession of a weapon in the second degree as defined in section 265.03.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); assault in the second degree as defined in section 120.05, and sexual abuse in the first degree as defined in section 130.65.

2. Authorized sentence.

APPENDIX D
Section 70.02 of the Penal Law of the State of New York

(a) The sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be an indeterminate sentence of imprisonment. Except as provided in subdivision five of section 60.05, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

(b) Except as provided in subdivision five of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies.

3. Maximum term of sentence. The maximum term of an indeterminate sentence for a violent felony offense must be fixed by the court as follows:

(a) For a class B felony, the term must be at least six years and must not exceed twenty-five years; and

(b) For a class C felony, the term must be at least four and one-half years and must not exceed fifteen years.

4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a violent felony offense must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence.

5. (a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must

APPENDIX D
Section 70.02 of the Penal Law
of the State of New York

impose an indeterminate sentence of imprisonment pursuant to section 70.00.

(b) In any case in which the provisions of paragraph (a) hereof apply, the court may impose a sentence other than an indeterminate sentence of imprisonment if it finds that one or more of the following factors exist; (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participating was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.